82-1855

No. ____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

INTERLOX PUNCH & DIE CORPORATION,
DAVEA INC. and WILLIAM WALLIS,
Petitioners,

v.

INSILCO CORPORATION, DURAND B. BLATZ,
ANTHONY J. MAINELLA and GEORGE PETERSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

Did the Superior Court of New Jersey, Appellate Division, err in finding that a Federal income tax deficiency relating to the operations of Interlox was asserted against Insilco?

Did the Superior Court of New Jersey, Appellate Division, err in finding that a Federal income tax was due in 1975 as a result of Insilco's receipt of the proceeds from an insurance claim?

Did the Superior Court of New Jersey, Appellate Division, misinterpret the Internal Revenue Code with respect to the terms "Federal income tax deficiency" and "Federal income tax due"?

Did the Superior Court of New Jersey, Appellate Division, err in finding that respondents' representations regarding a Federal income tax deficiency and a Federal income tax due were true?

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OPINION BELOW

The decision, without opinion, of the Supreme Court of New Jersey (App. B, p. B-1) is unreported. The opinion of the Superior Court of New Jersey, Appellate Division, (App. C, pp. C-1 to C-5) is unreported.

JURISDICTION

The opinion of the Supreme Court of New Jersey was made on February 15, 1983 and entered on February 17, 1983. The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (3) and Rule 17 of the Rules of this Court.

The judgment appealed from satisfies the criteria for the exercise of jurisdiction by this Court. It is a final judgment in that it leaves nothing to be judicially decided.

Market Street Railway Co. v. *Railroad Commission of California*, 324 U.S. 548, 65 S. Ct. 770, 89 L.Ed. 1171 (1945); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 67 S. Ct. 156, 91 L.Ed. 80 (1946).

The petitioners invoked the jurisdiction of the highest court in the State of New Jersey. *Great Western Telegraph Co.* v. *Burnham*, 162 U.S. 339, 16 S. Ct. 850, 40 L.Ed. 991 (1896). Since the Supreme Court of New Jersey declined to review the judgment of the Superior Court of New Jersey, Appellate Division, by denying the petition for certification, the Superior Court of New Jersey, Appellate Division, is the highest court in which a decision could be had. *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed.2d 261 (1977). Consequently, petitioners seek a writ of certiorari to the Superior Court of New Jersey, Appellate Division, and not to the Supreme Court of New Jersey.

Substantial federal questions were duly raised and adjudicated. Petitioners allege the misinterpretation by the lower courts of applicable provisions of the Internal Revenue Code. These provisions were a reference source in the contract between the parties. Certiorari is available under 28 U.S.C. § 1257 where no question is raised as to the validity of the statute but only as to the validity of its interpretation or whether it applies to the situation at bar. *Fischer* v. *Pauline Oil & Gas Co.*, 309 U.S. 293, 60 S. Ct. 535, 84 L.Ed. 764 (1940). The interpretation of the contract with respect to Federal income tax deficiency and Federal income tax due was the critical issue in the case. Consequently, there is a substantial question. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 23 S. Ct. 123, 47 L.Ed. 190 (1902).

The judgment does not rest upon an adequate nonfederal ground. *Herb* v. *Pitcairn*, 324 U.S. 117, 65 S. Ct.

459, 89 L.Ed. 789 (1954). Petitioners argued both in the Trial Court and in the Appellate Courts that (1) no Federal income tax deficiency was asserted against Insilco, (2) no Federal income tax was due in 1975 as a result of Insilco's receipt of insurance proceeds, and (3) the respondents had misrepresented that Interlox owed Insilco taxes of $137,640.00. These contentions were rejected by the Appellate Division in its opinion, which specifically sets out the petitioners' contentions and rejects them.

In rejecting petitioners' specified contentions, the Appellate Division necessarily made the following findings:

(1) A Federal income tax deficiency was asserted against Insilco;

(2) A Federal income tax was due in 1975 as a result of Insilco's receipt of the insurance proceeds; and

(3) Respondents' representations regarding taxes owed were true.

The interpretation of the Internal Revenue Code with respect to Federal income tax deficiency and Federal income tax due is so intertwined with the issue of respondents' representations that there is no adequate non-federal ground which can support the judgment. The judgment turns upon the interpretation of the Internal Revenue Code. *Arguendo*, even if the basis for the judgment were not clear but the non-federal ground were not a substantial or sufficient one, this Court should presume that the judgment was based on a federal question. *Williams* v. *Kaiser*, 323 U.S. 471, 65 S. Ct. 363, 89 L.Ed. 398 (1945). Under this circumstance, the only arguable non-federal ground would be the question of state law of contract interpretation. However, as discussed in Point III of the reasons for granting the writ, the only possible interpretation of paragraphs 5.4 of the March 30, 1975

contract is an interpretation under the Internal Revenue Code.

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent provisions of the Internal Revenue Code are set forth in App. J, p. J-1. The pertinent provisions of the contract involved are set forth in App. E, pp. E-1 to E-2.

STATEMENT

Petitioners commenced an action in the Superior Court of New Jersey seeking damages for fraud in the inducement of a certain contract dated July 30, 1976 which petitioners entered into in reliance upon misrepresentations by the respondents as to petitioners' liability for certain Federal income taxes allegedly owed by petitioners to respondents pursuant to an agreement between the parties dated March 30, 1975.

Petitioner Interlox Punch & Die Corporation was a subsidiary of respondent Insilco Corporation prior to March 30, 1975. Until that time, the two companies, together with other subsidiaries of Insilco, filed consolidated Federal income tax returns. By agreement dated March 30, 1975, petitioners Davea Inc. and William Wallis purchased Interlox from Insilco. The remaining named respondents are officers of the corporate respondent.

The relevant portion of the March 30, 1975 contract is paragraph 5.4 (App. E, pp. E-1 to E-2). Pursuant to that paragraph, petitioners obligated themselves to pay to Insilco certain Federal income taxes which may have become liabilities of Insilco. Insilco estimated that it would collect $200,000.00 from a pending insurance claim.

This amount was assigned to Insilco as part of the purchase price, and the petitioners agreed to pay no more than $50,000.00 of the Federal income tax due as a result of Insilco's receipt of the proceeds from this claim.

A second tax liability in question was a potential Federal income tax deficiency arising from an Internal Revenue audit of Insilco's 1971 consolidated return, in which Insilco had written up the assets it had acquired when it purchased Interlox in 1971. This estimated liability ranged from $158,000.00 at the commencement of negotiations down to $132,000.00 at the time the contract was signed. Ultimately, Insilco and the Internal Revenue Service settled on a figure of $87,640.00.

Almost immediately after the purchase, Interlox experienced severe financial difficulties. On November 17, 1975, petitioner William Wallis notified respondent Durand Blatz, President of Insilco, of the problems (App. F, p. F-1). Immediately thereafter, by letter dated November 19, 1975, (App. G, p. G-1), respondent Anthony J. Mainella demanded payment of $50,000.00 pursuant to paragraph 5.4 of the March 30, 1975 contract. Mr. Mainella also advised Mr. Wallis by telephone that Mr. Mainella had settled with the Internal Revenue Service for $87,640.00 and that the taxes would have to be paid. At a meeting held on December 8, 1975, respondent George Peterson, Vice-President of Finance for Insilco, also advised Mr. Wallis that $87,640.00 was due to the Internal Revenue Service. Mr. Wallis tried to ascertain whether the taxes had in fact been paid, but Insilco's position was that payment of the taxes was irrelevant. The respondents demanded payment of $137,640.00 in taxes pursuant to paragraph 5.4 and advised Mr. Wallis that if he could not come up with a plan to work things out, Insilco would close him down.

Faced with the threat of being closed down and held liable on personal guarantees in excess of $900,000.00, petitioners executed a new agreement on July 30, 1976, in which they paid Insilco the $137,640.00 in taxes demanded and satisfied other obligations by transferring more than $500,000.00 in assets to Insilco.

In December 1976, in a letter from Mr. Mainella addressed to Mr. Wallis, Mr. Wallis learned for the first time that Interlox had losses in all of its operating years and that no taxes had been paid on the consolidated return of Insilco. (App. H, p. H-1). As late as January 1977, Mr. Wallis did not have copies of the consolidated returns in order to verify respondents' statements that the taxes were due and payable pursuant to the March 1975 contract (App. I, pp. I-1 to I-2).

Petitioners commenced an action for damages for fraud, alleging that the respondents made misrepresentations that a Federal income tax deficiency had been asserted against Insilco as a result of the audit and that a Federal income tax was due as a result of Insilco's receipt of insurance proceeds. The federal questions involved at the trial were the interpretation of Internal Revenue Code sections regarding the definitions of a Federal income tax deficiency and a Federal income tax due. These questions were raised in the FOURTH COUNT of the complaint, which alleges that the respondents made a demand for Federal income taxes due pursuant to the March 30, 1975 contract, that the petitioners were unable to pay such sum and in lieu thereof entered into the July 30, 1976 agreement in reliance upon the representations of the respondents, and that the representations were false in that no taxes were due because Insilco had paid no taxes. (App. D, pp. D-1 to D-7). At trial, much of the testimony on both sides con-

cerned respondents' representations regarding petitioners' tax liability under the March 30, 1975 contract. These same arguments were advanced again on the appeal to the Superior Court of New Jersey, Appellate Division (App. C, pp. C-1 to C-5).

The Superior Court Judge wholly failed to instruct the jury as to the definition of a Federal income tax deficiency as a matter of law and also failed to instruct the jury as to the definition of the word "due" under applicable tax law. A jury verdict was returned in favor of the respondents and against the petitioners. Petitioners appealed to the Superior Court of New Jersey, Appellate Division, which affirmed the judgment in an opinion dated October 21, 1982 (App. C, pp. C-1 to C-5). Petitioners then filed a petition for certification to the Superior Court, Appellate Division, with the Supreme Court of New Jersey. By order dated February 15, 1983 and entered on February 17, 1983, the Supreme Court of New Jersey denied the petition for certification (App. B, p. B-1).

REASONS FOR GRANTING THE WRIT

By rejecting petitioners' contentions that no Federal income tax deficiency had been asserted against Insilco and that no Federal income tax was due as a result of Insilco's receipt of insurance proceeds, the Superior Court of New Jersey, Appellate Division, has misinterpreted the applicable provisions of the Internal Revenue Code and has established a seriously flawed precedent for the construction of all corporate acquisition and merger agreements throughout the United States which necessarily incorporate Internal Revenue Code terminology. Furthermore, the decision is in conflict with the decisions of the Federal Court of Appeals in several circuits.

This Court has not hesitated to grant certiorari to resolve conflict among the circuits regarding the definition of terms used in the Internal Revenue Code. *Malet* v. *Riddell*, 383 U.S. 569, 86 S. Ct. 1030, 16 L.Ed.2d 102 (1966); *Commissioner* v. *Glenshaw Glass Company*, 348 U.S. 426, 75 S. Ct. 473, 99 L.Ed. 483 (1955). The same principles should apply here.

POINT I

NO FEDERAL INCOME TAX DEFICIENCY RELATING TO THE OPERATIONS OF INTERLOX WAS ASSERTED AGAINST INSILCO

Paragraph 5.4 of the March 30, 1975 contract provided as follows:

> In addition it is agreed that if a Federal income tax deficiency is asserted against Seller which relates to the operations of Interlox prior to the date hereof, Buyer and Wallis shall, promptly upon receipt of notice from Seller of such deficiency, pay or cause Interlox to pay to Seller an amount equal to such deficiency; . . .

A deficiency under 26 U.S.C. § 6211 is defined in terms of an amount of tax (App. J, p. J-1). A reduction in a claimed net operating loss is not a deficiency. *Gunderson Bros. Engineering Corp.*, 42 T.C. 419 (1964). The rule is the same when the taxpayer files a consolidated return. *Standard Oil Company (New Jersey)* v. *McMahon*, 139 F.Supp. 690 (S.D.N.Y. 1956) aff'd 244 F.22d 11 (2d Cir. 1957); *LTV Corp.*, 64 T.C. 589 (1975).

In *Gunderson Bros.*, 42 T.C. 419, petitioner received a notice of adjustments which would have had the effect of reducing its net operating loss. The tax court held: "This did not constitute a deficiency or a proposed deficiency."

In *Standard Oil*, 139 F.Supp. 690, the Commissioner audited several of Standard Oil's consolidated excess profits tax returns under former § 272 of the Internal Revenue Code of 1939, now §§ 6212 and 6213. Some of the affiliated corporations showed profits, and others showed losses. By applying a net operating loss carryback, the Court found that the debt of the tax had been erased and that the net result was the deficiency had been extinguished. The District Court held: "[When] the final figure or balance does not reflect a sum owing by the taxpayer to the Government, there is no deficiency to be assessed." *Standard Oil*, 139 F.Supp. 690, 695-696.

When it acquired Interlox in 1971, Insilco wrote up the assets, thereby stepping up its basis. Insilco anticipated a potential income tax liability as a result of this action and reflected this potential liability on the pro forma balance sheet which was attached to the 1975 contract. The federal audit was pending when the March 1975 contract was executed. In the latter part of that year, after plaintiffs purchased Interlox, Mr. Mainella advised Mr. Wallis that the Internal Revenue Service had determined that $87,000.00 was due with respect to the write up of assets and the acquisition of Interlox in 1971.

By letter from Mr. Mainella dated December 28, 1976, Mr. Wallis learned that on a separate return basis, Interlox had tax losses of $76,962.00 in 1972, $106,908.00 in 1973, and $176,977.00 in 1974. (App. H, p. H-1).

By carrying back only a fraction of its losses, Interlox's "tax debt" of $87,640.00 was eliminated. Therefore, by definition, no Federal income tax deficiency was asserted against Insilco. *Standard Oil*, 139 F.Supp. 690; see also *Paccon, Inc.*, 45 T.C. 392 (1966); see also *Charles E. Myers, Sr.*, 28 T.C. 12 (1957).

One learned commentator has stated:

> A deficiency is neither a legal theory nor an intangible concept. It is an *amount* of tax due representing the difference between the amount returned by the taxpayer and the amount which, in fact and law, is due the Government. 9 Mertens, *Law of Federal Income Taxation*, Section 49.129, citing *Herbert Luke*, T.C.M. 1964-176, aff'd 351 F.2d 568 (7th Cir. 1965).

Consistent with this concept is the characterization of a deficiency as a "shortage." *Lyddon & Company* v. *U.S.*, 158 F.Supp. 951 (Ct. Cl. 1958).

Pursuant to I.R.C. §§ 6212(a) and 6213(a), the IRS may either *determine* a deficiency or *assess* a deficiency. It may not, however, assess a deficiency without first determining that there is a deficiency and sending a notice of such deficiency to the taxpayer. The difference between the two terms was explained by the District Court in *Standard Oil*, 139 F.Supp. 690. If the Service *determines* a deficiency, it may send a notice pursuant to I.R.C. § 6212(a). If the Service *assesses* a deficiency, it *must* send notice pursuant to I.R.C. § 6213(a). An assessment is more in that it is "the first objective step in the process of actually collecting the tax from the taxpayer." *Standard Oil*, 139 F.Supp. at 695.

Although paragraph 5.4 of the March 1975 contract refers to a Federal income tax deficiency being "asserted," that term is not used in Chapter 63 of the Internal Revenue Code dealing with assessments. However, both in fact and in law, the only possible interpretation of the term is that it refers to an assessment i.e. the commencement by the IRS of its procedure to collect an additional tax due.

Essentially, Mr. Wallis' position was that he was not required to pay the taxes unless Insilco had first paid them to Internal Revenue, and Insilco's position was that the payments were required by the contract and that they were dependent on the tax consequences and not upon actual out of pocket payments. But paragraph 5.4 requires that the Federal income tax deficiency be asserted. In a case dealing with the revival of a tax liability previously forgiven, the Fifth Circuit stated:

> Deficiency, as it is used in the statute, (citation omitted), relates to the assertion of a claim for an *additional* tax as a part of the mechanism by which the Board of Tax Appeals, now the Tax Court, acquires jurisdiction . . . *U.S.* v. *Curd*, 257 F.2d 347, 350 (5th Cir. 1958).

As a matter of law, Mr. Wallis' position is correct. No Federal income tax deficiency was ever asserted against Insilco because Interlox's losses were sufficient to offset any "tax debt."

POINT II

NO FEDERAL INCOME TAX WAS DUE IN 1975 AS A RESULT OF INSILCO'S RECEIPT OF $249,000.00 FROM AN INSURANCE CLAIM

Under 26 U.S.C. § 6151, payment of taxes is due when the corporation return is filed. Corporation returns are due on March 15 for the close of the calendar year, and on the 15th day of the third month following the close of the fiscal year. 26 U.S.C. 6072(b). Therefore, Federal income taxes are due as of the date the tax return for the particular period is required to be filed. *U.S.* v. *Ressler*, 433 F.Supp. 459 (S.D. Fla. 1977); *Pan American Van Lines* v. *U.S.*, 606 F.2d 1299 (9th Cir. 1979); *U.S.* v. *Adams Building Co. Inc.*, 531 F.2d 342 (6th Cir. 1976); *U.S.* v. *Northwestern Mutual Insurance Company*, 315 F.2d 723

(9th Cir. 1963); *Hartman* v. *Lauchli*, 238 F.2d 881 (8th Cir. 1957). (App. J, p. J-1).

By letter dated November 19, 1975, Mr. Mainella advised Mr. Wallis that the proceeds of the insurance claim had been received and that the Federal income tax due exceeded $50,000.00. Mr. Mainella then demanded payment of that sum pursuant to paragraph 5.4 of the March 1975 agreement. As a matter of law, no tax could have been due on the receipt of income in 1975 until the corporation was required to file its 1975 tax return in the year 1976. In fact, the receipt of $149,000.00 of the $249,000.00 settlement was reported in the 1975 tax year on the return filed on September 15, 1976. The balance of the claim was not even reported by Insilco to Internal Revenue until January 12 of 1977. Consequently, Mr. Mainella's letter of November 19, 1975 was a blatant misrepresentation that $50,000.00 in Federal income taxes was due.

Mr. Mainella testified at trial that he stated as a matter of *fact* that the $50,000.00 was due. He maintained that the taxes were due when the claim was reported on the balance sheet because Insilco was an accrual basis taxpayer. When questioned whether the tax was in fact not due until a return was filed, Mr. Mainella responded that it was due when this transaction was recorded and that the time for the filing of the return is the time "when you settle up." At his deposition, however, in response to the question when the tax liability became due to the Federal Government he answered, "it was due to the Federal Government when we filed our 1975 Federal income tax returns."

No testimony was ever adduced at trial that Insilco had in fact paid $50,000.00 to the Internal Revenue Service as a result of receiving the insurance claim. The defendants'

position was that the $50,000.00 was paid to the Internal Revenue Service by way of reducing refunds on some of the consolidated companies. What Mr. Mainella failed to state was that any taxes due as a result of this Interlox claim were more than offset by Interlox losses. The fact that on a consolidated basis, tax refunds may have been reduced is irrelevant. Section 5.4 of the March 1975 agreement clearly contemplates that any tax liability assumed by Davea and Mr. Wallis must have been related to the *operations* of Interlox. Consequently, Insilco was required to offset any taxes due against past losses of Interlox.

POINT III

THE TERMS "FEDERAL INCOME TAX DEFICIENCY" AND "FEDERAL INCOME TAX DUE" MUST BE INTERPRETED IN ACCORDANCE WITH THE INTERNAL REVENUE CODE

Unless the context of the agreement or other relevant circumstances indicate otherwise, technical terms in a contract must be given their technical meaning. *Deerhurst Estates* v. *Meadow Homes, Inc.*, 64 N.J. Super. 134 (1960); *Josefowicz* v. *Porter*, 32 N.J. Super. 585 (1954). Furthermore, if the term used is an exclusively legal term, and if the contract itself requires the application of a statute, the term must be construed in its statutory sense. *Deerhurst, supra*, citing *Fischer & Porter Co.* v. *Porter*, 364 Pa. 495, 72 A.2d 98, 101 (Sup. Ct. 1950).

At issue in *Deerhurst* was the construction of the term *tentative approval*. The Court declined to state as a matter of law that the term was to be construed in its statutory sense, noting that the same words may have a variety of ordinary or of technical meanings.

In a case more analogous than *Deerhurst* to the one at bar, the Pennsylvania Court in *Fischer & Porter, supra,* construed the term *overpayment* in the sense that term was used by the Internal Revenue Code. Although the term could have a variety of ordinary meanings, the Court applied the statutory construction because it found the context of the contract required application of the Code. Furthermore, the Court found that the only contrary evidence was self-serving testimony that one of the parties did not interpret the contract that way, testimony which the Court found to be inadmissible.

In drafting paragraph 5.4 of the March 1975 agreement, the parties in this action, their accountants and attorneys, aware of the pending IRS audit, freely chose to employ the technical language of the Code in their agreement. This was a logical choice on the part of the respective parties because the selection of the statutory terms provided a standard of interpretation which all concerned could understand and apply as the situations arose. The very terms selected, *Federal income tax deficiency* and *Federal income tax due,* obviously make reference to the Internal Revenue Code. No other standard exists for determining the existence of a Federal income tax deficiency or the time when a Federal income tax is due. The Lower Court was required as a matter of law to construe the terms in their technical sense, unless Insilco could prove that the parties intended otherwise, a task which it wholly failed to perform. The only evidence offered by Insilco was the self-serving declarations of its officers that they did not interpret the contract in the technical sense, testimony which should have been inadmissible and which falls far short of the standard enunciated in *Fischer & Porter Co.* v. *Porter,* 364 Pa. 495, 72 A.2d 98 (Sup. Ct. 1050) and cited with approval in

Deerhurst Estates v. *Meadow Homes, Inc.*, 64 N.J. Super. 134 (1960).

In *Killoran* v. *Fineman*, 126 F.Supp. 76 (E.D.Pa. 1954) the buyer and seller of corporate stock agreed that the price should be reduced by the amount of a determination, assessment, and payment of any income tax deficiency for prior years. Prior to the sale, the corporation had filed income tax returns for the year 1947 showing a tax liability in excess of $19,000.00. After audit, this amount was increased to over $23,000.00. However, an overassessment was allowed for the year 1947 primarily due to tax carry back of losses sustained in 1949, cancelling the corporation's potential tax liability for 1947. The buyer argued that there was a tax deficiency for 1947 which required a reduction in the purchase price. The seller argued that there was no income tax deficiency for the year 1947 and thus the buyer was not entitled to a reduction in the purchase price. The Court did not decide whether the parties intended the words *determination* and *assessment* to have a meaning other than that set forth in the Internal Revenue Code, finding that it was undisputed that no payment had been made and that the word *payment* must be construed in its literal sense. In *dicta*, however, the Court noted that the technical interpretations set forth by the seller with respect to the definition of deficiency were correct stating:

> [Seller] contends with considerable persuasiveness that there was no corporate income tax 'deficiency' for the year 1947 and there was no 'determination' or 'assessment' or 'payment' of any deficiency for that year. With respect to the words 'deficiency,' 'determination,' and 'assessment' [Seller's] contention would probably be correct if we were to interpret those words as would a tax lawyer. 126 F.Supp. at 78.

In *Starobin* v. *Miskowitz*, 280 App. Div. 629, 116 N.Y.S.2d 476, appealed dismissed 305 N.Y. 567, 111 N.E.2d 441 (1953), a contract for the sale of stock provided that the price was to be adjusted depending upon the corporation's liability for federal income and excess profit taxes. The Appellate Court in New York interpreted the contract according to the Internal Revenue Code, stating that this construction affected the intention of the parties insofar as one could read it from the agreement.

Respondents have argued below that the term *Federal income tax due* was interpreted by them in the sense that an expense for taxes accrued upon receipt of the insurance proceeds. This agreement is without merit. Factually, respondents rely upon the self-serving testimony of respondent Anthony J. Mainella, who testified at the trial that the taxes were due when the claim was reported on the balance sheet because Insilco was an accrual basis taxpayer. At trial, Mr. Mainella testified that the tax was due when the transaction was recorded and that the time for the filing of the return is the time "when you settle up." However, at a prior deposition, in response to the question when the tax liability became due, Mr. Mainella responded: "it was due to the Federal Government when we filed our 1975 Federal income tax returns." Not only did Mr. Mainella change his testimony at the trial, but he incorrectly stated at trial that accrual of a tax should be equated with its due date. As a matter of law, that is incorrect. In *Willoughby Camera Stores Inc.* v. *Commissioner*, 125 F.2d 607, 609, (C.C.A. 2d Cir. 1942), the Court of Appeals stated:

> . . . the use of the word 'accrued' does not signify that the item is due. On the contrary, the accrual system wholly disregards due dates. United States v.

Anderson, 269 US 422, 425, 46 S. Ct. 131, 70 L.ED. 347.

In *Commissioner* v. *Adda, Inc.*, 171 F.2d 367 (2d Cir. 1949), the Court of Appeals held that the privilege of accruing taxes does not thereby impose a liability to pay taxes before they become due.

Consequently, as a matter of law, the interpretations of the terms *Federal income tax deficiency* and *Federal income tax due*, as contemplated by the parties in paragraph 5.4 of the March 1975 agreement, were those set forth in the Internal Revenue Code.

CONCLUSION

This Court should review this case because the misinterpretation of the applicable provisions of the Internal Revenue Code by the New Jersey Court is in conflict with interpretations rendered by the Federal Court of Appeals in several circuits and is a matter of substantial public importance and concern because of the impact upon the construction of corporate acquisition and merger agreements, which documents necessarily incorporate Internal Revenue Code terminology. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

FINAL JUDGMENT (57a-60a) FILED JULY 30, 1980

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MORRIS COUNTY
DOCKET NO. L-51058-78
(Consolidated Action)

INTERLOX PUNCH AND DIE CORPORATION, *et al.*,
Plaintiffs,

v.

INSILCO CORPORATION, *et al.*,
Defendants.

Civil Action

FINAL JUDGMENT

FILED
JUL 30 1980
Kenneth C. MacKenzie, J.S.C.
ORIGINAL TO TRENTON

This action came on for trial before the Court and a jury on June 23, 1980 on the complaint of plaintiffs Interlox Punch and Die Corporation, Davea, Inc. and William C. Wallis, and the Court having directed the jury to return a special verdict in the form of special written findings on the issues of fact pursuant to R.4:39-1, and the jury having returned its special verdict in the form directed by the Court, and the Court having directed based on said special verdict that judgment should be entered

on the merits in favor of defendants Insilco Corporation, Durand B. Blatz, Anthony J. Mainella and George Peterson; and the counterclaim of defendant Insilco Corporation against said plaintiffs and its separate action for possession of premises North Main Street, Boonton Township, New Jersey were heard by the Court sitting without a jury on July 23, 1980 by the consent of the parties:

It is on this 30th day of July, 1980, ordered:

1. That judgment be entered for defendants Insilco Corporation, Durand B. Blatz, Anthony J. Mainella and George Peterson against plaintiffs Interlox Punch and Die Corporation, Davea, Inc. and William C. Wallis on all counts of their complaint as amended by the pretrial order.

2. That judgment be entered for defendant Insilco Corporation against plaintiff Interlox Punch and Die Corporation in the amount of $167,118.49 together with costs but without prejudgment interest on the First County of defendant Insilco Corporation's counterclaim.

3. That judgment be entered for defendant Insilco Corporation against plaintiffs Interlox Punch and Die Corporation, Davea, Inc. and William C. Wallis, jointly and severally, in the amount of $136,000 together with costs but without prejudgment interest on the Second Count of defendant Insilco Corporation's counterclaim.

4. That judgment be entered for plaintiffs Interlox Punch and Die Corporation, Davea, Inc. and William C. Wallis against defendant Insilco Corporation on the Sixth Count of defendant Insilco Corporation's counterclaim as amended by the pretrial order.

5. That the Third, Fourth and Fifth Counts of the counterclaim of Insilco Corporation are dismissed.

6. That plaintiff Interlox Punch and Die Corporation deliver to or leave at premises North Main Street, Boonton Township, New Jersey the inventory sold by Interlox Punch

and Die Corporation to Insilco Corporation pursuant to the July 30, 1976 Agreement among Insilco Corporation, Interlox Punch and Die Corporation, Davea, Inc. and William C. Wallis on July 31, 1980 at 9:00 A.M.

7. That the $8,800 security deposit held by Rabner & Allcorn, Esqs. pursuant to the order dated May 5, 1980 of this Court is terminated and said funds are released.

8. That judgment for possession be entered for defendant Insilco Corporation on its separate action for premises North Main Street, Boonton Township, New Jersey for the failure to pay rent of $134,166.82, and the Sheriff of the County of Morris is hereby authorized and directed to remove all persons from said premises and to cause Insilco Corporation to have possession of said premises forthwith.

/s/ Kenneth C. MacKenzie
KENNETH C. MACKENZIE
J.S.C.

Consented to as to form:

RABNER & ALLCORN

APPENDIX B

C-429 SEPTEMBER TERM 1982
20, 502

INTERLOX PUNCH & DIE CORP., *et al.*,
Plaintiffs,

and

WILLIAM C. WALLIS,
Plaintiff-Petitioner,

vs.

INSILCO CORP., *et al.*,
Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-164-80T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 15th day of February, 1983.

STEPHEN W. TOWNSEND
Stephen W. Townsend
Clerk

FILED
SUPREME COURT
FEB 17 1983
Stephen W. Townsend
Clerk

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-164-80T1

INTERLOX PUNCH & DIE CORP.,
DAVEA, INC., and WILLIAM C. WALLIS,
Plaintiffs-Appellants,

v.

INSILCO CORP., DURAND B. BLATZ,
ANTHONY J. MAINELLA and GEORGE PETERSON,
Defendants-Respondents.

ORIGINAL FILED
OCT 21 1982
ELIZABETH McLAUGHLIN
Clerk

Submitted October 12, 1982. Decided OCT 21 1982

Before Judges Bischoff, J. H. Coleman and Gaulkin.

On appeal from Superior Court of New Jersey, Law Division, Morris County.

William C. Wallis, appellant, filed a brief *pro se*.

Hannoch, Weisman, Stern, Besser, Berkowitz & Kinney, attorneys for respondents (Albert G. Besser, of counsel; Bronna G. Levin, on the brief).

PER CURIAM

In 1975 defendant Insilco Corporation entered into a contract to sell to plaintiff Interlox Punch & Die Corporation (Interlox) all of the capital stock of plaintiff Davea, Inc. Plaintiff William C. Wallis formed Davea, Inc., a holding company, solely for the purpose of acquiring the stock of Interlox. Part of the consideration for the sales contract was Interlox's agree-

ment to pay Insilco Corp. certain federal income taxes incurred by Insilco Corp. in the operation of Interlox. Interlox had been a subsidiary of Insilco Corp. since 1971.

Shortly after execution of the sales agreement, a dispute arose over the payment of the consideration required by the contract. This dispute was resolved by restructuring the 1975 contract. The restructuring provisions were embodied in a 1976 sales-leaseback agreement. In this agreement, Davea, Inc., transferred to Insilco Corp. all of its right, title and interest in certain Interlox machinery and equipment in satisfaction of claims by Insilco Corp. against Davea, Inc., relating to tax matters in the amount of $137,640. A general release of Insilco Corp. was signed by Wallis. However, this did not end the disputes.

In May 1979, defendants instituted an action in the District Court against plaintiffs to recover certain property leased to plaintiffs by defendants. In July 1979, plaintiffs commenced an action against defendants in the Superior Court, Law Division, seeking rescission and damages for the breach of two contracts executed by the plaintiffs and the defendant corporation in 1975 and 1976. In August, 1979 these two actions were consolidated for trial in the Law Division.

In April, 1980, summary judgment was entered in favor of defendants on count 3 of the plaintiffs' complaint which charged violations of the New Jersey Securities Act. *Interlox Punch & Die Corp.* v. *Insilco Corp.*, 174 *N.J. Super.* 175 (Law Div. 1980). On June 2, 1980 the court bifurcated trial on those counts of the complaint and counterclaim relating to the 1975 and 1976 transactions, and ordered that the issues related to the 1976 transaction be tried first.

At the trial before a jury, plaintiffs elected to seek damages based only on the breach of the 1976 contract, thereby rendering academic claims with respect to the 1975 transaction. At the end of plaintiffs' case, the trial judge dismissed some of the allegations relating to the 1976 transaction. The jury returned a verdict in favor of defendants on the remaining four allega-

tions of fraud in the inducement. Final judgment was entered against plaintiffs on July 30, 1980.

Insilco Corp.'s counterclaim relating to the 1976 transaction was tried before the court without a jury. Judgment was entered in favor of Insilco and against Interlox on the first and second counts. The third, fourth and fifth counts relating to the 1975 transaction were dismissed.

Plaintiffs have appealed, contending:

1. NO FEDERAL INCOME TAX DEFICIENCY RELATING TO THE OPERATIONS OF INTERLOX WAS ASSERTED AGAINST INSILCO.
2. THE ALLEGED FEDERAL INCOME TAX DEFICIENCY HAD BEEN PAID BY PLAINTIFFS IN 1975 BY THE INCLUSION OF DEFERRED TAXES OF $132,000 IN THE PURCHASE PRICE.
3. NO FEDERAL INCOME TAX WAS DUE IN 1975 AS A RESULT OF INSILCO'S RECEIPT OF $249,000 FROM AN INSURANCE CLAIM.
4. DEFENDANTS MISREPRESENTED THAT INTERLOX OWED INSILCO TAXES OF $137,640.
5. THE TRIAL COURT COMMITTED REVERSIBLE ERRORS IN ITS CHARGES TO THE JURY.
6. THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

We have carefully considered the contentions raised in the briefs and the arguments advanced in support of them. We are satisfied from our careful study of the record that all issues of fact and law raised are clearly without merit. *R.* 2:11-3(e)(1)(A), (B), (C) and (E). The charge to the jury, when considered in its entirety, did not constitute error. *State* v. *Wilbely*, 63 *N.J.* 420, 422 (1973). The evidence before the jury and the judge amply supports their determinations. *Rova Farms Resort, Inc.* v. *Investors Ins. Co.*, 65 *N.J.* 474 (1974). Accordingly, the judgment under review is affirmed.

I hereby certify that the foregoing Is a true copy of the original on file in my office.

ELIZABETH MCLAUGHLIN
Elizabeth McLaughlin

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NO:

COMPLAINT (INTERLOX v. INSILCO)
(5a-11a) FILED JUNE 1979

IRWIN AND POST, P.A.
744 Broad Street
Newark, New Jersey 07102
(201) 622-6351
Attorneys for Plaintiffs

INTERLOX PUNCH & DIE CORPORATION, a Delaware corporation and DAVEA, INC., a New Jersey corporation, WILLIAM WALLIS, individually,

Plaintiffs,

vs.

INSILCO CORPORATION, a Connecticut corporation, DURAND B. BLATZ, ANTHONY J. MAINELLA, GEORGE PETERSON, individually,

Defendants,

Civil Action

COMPLAINT

The plaintiffs INTERLOX PUNCH & DIE CORPORATION, a Delaware corporation, hereinafter "Interlox," DAVEA, INC., a New Jersey corporation, hereinafter "Davea," and WILLIAM WALLIS say by way of Complaint:

FIRST COUNT

1. INTERLOX with offices at North Main Street, in the Township of Boonton, County of Morris and State of New

Jersey is in the business of manufacturing and selling precision shoulder punches and die buttons for the metal stamping industry.

2. DAVEA with offices at North Main Street, in the Township of Boonton, County of Morris and State of New Jersey is the holder of all of the outstanding stock of Interlox.

3. WILLIAM WALLIS residing at the Upper Mountain Avenue, in the town of Montclair, County of Essex and State of New Jersey is the President of Interlox, President of Davea and owner of all of the common stock of Davea.

4. INSILCO CORPORATION, a Connecticut corporation, hereinafter "Insilco," with offices at 1000 Research Parkway, Meriden, Connecticut was until March 27, 1975, the owner of all of the outstanding stock of Interlox.

5. DURAND B. BLATZ, with a place of business at 1000 Research Parkway, Meriden, Connecticut was at all times relevant hereto President of Insilco.

6. ANTHONY J. MAINELLA, with a place of business at 1000 Research Parkway, Meriden, Connecticut was at all times relevant hereto Assistant Treasurer and Tax Manager of Insilco.

7. GEORGE PETERSON, with a place of business at 1000 Research Parkway, Meriden, Connecticut was at all times relevant hereto Vice President and General Counsel of Insilco.

8. On or about January 1, 1975, William Wallis entered into negotiations with Insilco for the purchase of Insilco.

9. On or about March 24, 1975, Davea was formed to purchase all of the outstanding stock of Interlox.

10. On or about March 27, 1975, Davea entered into a contract to purchase all of the outstanding stock of Interlox for the sum of $1,111,000.00. Of that sum $150,000.00 was paid in cash and $961,000.00 was to be paid pursuant to two notes given Insilco by Davea and guaranteed by Wallis and Interlox.

11. Insilco, Durand B. Blatz, Anthony J. Mainella and George Peterson induced Davea to enter into the aforementioned contract and Interlox and Wallis to enter into guarantees thereto by fraud.

12. More particularly the fraud consisted of misrepresentation of the financial condition of Interlox, misrepresentation of the value of the assets and extent of the liabilities of Interlox, misrepresentation of tax liabilities of Interlox and other misrepresentations.

13. Insilco, Blatz, Mainella and Peterson intended that Davea, Interlox and Wallis rely upon their fraudulent representations in entering into the contract and guarantees.

14. Davea, Interlox and Wallis did rely upon such fraudulent representations in entering into the contract and were injured thereby.

WHEREFORE the plaintiffs demand judgment against the defendants jointly and severally as follows:

(a) For the rescission of the contract and the guarantees.

(b) For the restitution of all sums paid by the plaintiffs.

(c) For damages, including punitive damages, interest and costs.

(d) For such other relief as the Court deems just.

SECOND COUNT

1. The plaintiffs repeat and incorporate the allegations of the preceding Court as though set forth herein.

2. By virtue of the contract of March 27, 1975, Insilco made various representations and warranties to Davea, Interlox and Wallis.

3. Such representations and warranties were false.

4. Insilco breached the aforementioned warranties and otherwise breached the contract.

WHEREFORE, the plaintiffs demand judgment against the defendants jointly and severally as follows:

(a) For the rescission of the contract and the guarantees.

(b) For the restitution of all sums paid by the plaintiffs.

(c) For damages, including punitive damages, interest and costs.

(d) For such other relief as the Court deems just.

THIRD COUNT

1. The plaintiffs repeat and incorporate the allegations of the foregoing Counts as though set forth herein.

2. By virtue of such conduct, Insilco, Blatz, Mainella and Peterson violated N.J.S.A. 49:3-27, *et seq.*, and more particularly N.J.S.A. 49:3-71.

3. Davea, Interlox and Wallis were damaged thereby.

WHEREFORE, the plaintiffs demand judgment against the defendants jointly and severally as follows:

(a) For the rescission of the contract and the guarantees.

(b) For the restitution of all sums paid by the plaintiffs.

(c) For damages, including punitive damages, interest and costs.

(d) For such other relief as the Court deems just.

FOURTH COUNT

1. The plaintiffs repeat and incorporate the allegations of the foregoing Counts as though set forth herein.

2. Late in 1975 and early in 1976, Insilco demanded that Interlox pay $142,900 in Federal income taxes which Insilco, Blatz, Mainella and Peterson represented was owed pursuant to the agreement.

3. Interlox was unable to pay such sum.

4. In lieu of such payment, Interlox, Davea and Wallis agreed, on July 30, 1976, to transfer the equipment, land and building owned by Interlox to Insilco and to lease back the same Davea and Wallis further agreed to sell 565,000 shares of Davea's preferred stock to Insilco for $565,000.

5. The representations of Insilco, Blatz, Mainella and Peterson representing the taxes paid on account of Interlox were false.

6. As they later admitted, Insilco paid no taxes on account of Interlox for the years 1973, 1974 or 1975.

7. Interlox, Davea and Wallis relied upon the representations of Insilco, Blatz, Mainella and Peterson in entering into the agreement of July 30, 1976.

8. Interlox, Davea and Wallis were injured thereby.

WHEREFORE, the plaintiffs demand judgment against the defendants jointly and severally as follows:

(a) For rescission of the agreement on July 30, 1976.

(b) For damages, including punitive damages, interest and costs.

(c) For such other relief as the Court deems just under the circumstances.

FIFTH COUNT

1. The plaintiffs repeat and incorporate the allegations of the foregoing Counts as though set forth herein.

2. The agreement of July 30, 1976, was the product of duress.

WHEREFORE, the plaintiffs demand judgment against the defendants jointly and severally as follows:

(a) For rescission of the agreement of July 30, 1976.

(b) For damages, including punitive damages, interest and costs.

(c) For such other relief as the Court deems just under the circumstances.

SIXTH COUNT

1. The plaintiffs repeat and incorporate the allegations of the preceding Court as though set forth herein.

2. The defendants, Insilco, Blatz, Mainella and Peterson, compared to deprive Interlox, Davea and Wallis of all of the valuable assets of Interlox.

WHEREFORE, the plaintiffs demand judgment against the defendants jointly or severally for damages, including punitive damages, interest and costs.

JURY DEMAND

The plaintiffs hereby request a jury of six (6) persons on all issues.

IRWIN AND POST, P.A.
Attorneys for Plaintiffs

/s/ John N. Post
JOHN N. POST

DATE: June 13, 1979

APPENDIX E

PARAGRAPH 5.4 OF THE MARCH 30, 1975 CONTRACT

5.4 *Tax Payments.* It is agreed that for Federal income tax purposes, since July 21, 1971, Interlox has been included in the consolidated Federal income tax return of Seller and, including the $5,300 paid to Seller on the date hereof, Interlox has paid Seller all amounts applicable to the Federal income tax liability of Seller indicated on such returns which is attributable to the operations of Interlox prior to the date hereof. Although $50,000 has been accrued on the balance sheet of Interlox as at December 31, 1974, no amount has been paid to Seller for the tax liability which may become payable as a result of Seller's receiving the proceeds of the claim dated January 3, 1975, as amended, under the Bond Indemnity Agreement which has been assigned to Seller. Accordingly, it is agreed that promptly upon notice by Seller to Buyer of the Federal income tax due as a result of the receipt of the proceeds of such claim, Buyer and Wallis shall, or shall cause Interlox to, pay to Seller an amount equal to the Federal income tax liability indicated, in such notice, but in no event shall Wallis, Buyer or Interlox be obligated to pay Seller an amount in excess of $50,000 with respect to taxes on such proceeds. In addition it is agreed that if a Federal income tax deficiency is asserted against Seller which relates to the operations of Interlox prior to the date hereof, Buyer and Wallis shall, promptly upon receipt of notice from Seller of such deficiency, pay or cause Interlox to pay to Seller an amount equal to such deficiency; provided that, Wallis, Buyer and Interlox shall not be obligated to pay Seller any amount which when added to all other amounts paid under this sentence and other amounts paid for federal income tax deficiencies of Interlox for all periods ending on or prior to the date hereof, (exclusive of the tax on the proceeds of the Bond Indemnity Agreement) would exceed $130,000 plus an amount equal to any current or future tax savings (discounted to present value at the date of the deficiency at the Morgan Prime Rate then in effect) which Interlox will

realize as a result of the payment of any deficiency in excess of $130,000 which relates to the operation of Interlox for periods prior to the date hereof.

It is agreed that for state and local income tax purposes, Interlox will include the period from January 1, 1975 through the date hereof in its 1975 return and will pay all taxes relating to the operations of Interlox during that period. It is further agreed that Interlox has assigned to Seller all of Interlox's right to receive any refund from Federal or state governmental authorities as a result of the overpayment of any income or franchise taxes for the years 1971, 1972, 1973 and 1974, and Buyer and Wallis agree to, and to cause Interlox to, promptly deliver to Seller any refunds so received by either of them.

APPENDIX F

LETTER DATED NOVEMBER 17, 1975 FROM WILLIAM C. WALLIS TO DURAND B. BLATZ

November 17, 1975

Mr. DURAND B. BLATZ, PRESIDENT
INSILCO CORPORATION
1000 RESEARCH PARKWAY
MERIDEN, CONNECTICUT

DEAR MR. BLATZ,

I HAVE DECIDED TO IMMEDIATELY DROP ALL OTHER TIME COMMITTMENTS AND DEVOTE ALL MY ENERGIES TO INTERLOX. IN ORDER TO BE SUCCESSFUL IT IS NECESSARY TO SEEK THE FOLLOWING:

1. A MORATORIUM ON INTEREST FOR THE 3RD AND 4TH QUARTERS OF 1975 (PAYMENTS DUE SEPTEMBER 30 AND DECEMBER 31)

2. RE-EMPLOYMENT BY YOU OF J. AUSTIN DEVINE ON DECEMBER 1, 1975.

GENERAL CONDITIONS IN INDUSTRY APPEAR TO BE IMPROVING RAPIDLY BUT INTERLOX HAS BEEN UNABLE TO KEEP PAYROLL AS % OF SHIPMENTS LOW ENOUGH AND HAS BEEN UNABLE TO INCREASE SHIPMENTS TO MEET INCOMING ORDERS.

A FIRM HAND IS NEEDED IN DAY TO DAY OPERATIONS AND I AM TAKING PERSONAL CHARGE MONDAY NOVEMBER 24, 1975. WITH INTERLOX BEING RELIEVED OF A SUBSTANTIAL INTEREST BURDEN IN LAST 1/2 1975 AND A VERY HIGH G & A COST IN

FIRST 1/2 OF 1976 THE COMPANY WILL BE PROFITABLE MONTHLY STARTING DECEMBER 1975.

I AM LOOKING FORWARD TO HEARING FROM YOU CONCERNING THESE MATTERS.

SINCERELY YOURS,

/s/ William C. Wallis
WILLIAM C. WALLIS

APPENDIX G

LETTER DATED NOVEMBER 19, 1975 FROM ANTHONY J. MAINELLA TO DAVEA, INC.

November 19, 1975

Davea, Inc.
North Main Street
Boonton, New Jersey 07005

Attention: Mr. William Wallis

Dear Mr. Wallis:

Reference is made to the Purchase Agreement dated as of March 27, 1975 between Insilco Corporation (Seller) and Davea, Inc. (Buyer) for the shares of Interlox Punch and Die Corporation (Interlox). Further reference is made to paragraph 5.4 thereof wherein it was stated that $50,000 has been accrued on the balance sheet of Interlox as of December 31, 1974 for the tax liability which may become payable to Seller as a result of Seller's receiving the proceeds of the claim dated January 3, 1975, as amended, under the Bond Indemnity Agreement which has been assigned to Seller. It was further agreed that promptly upon notice of Seller to Buyer of the Federal income tax due as a result of the receipt of proceeds of such claim, Buyer and Wallis shall, or shall cause Interlox to pay to Seller an amount equal to the Federal income tax liability but not in excess of $50,000.

Please be advised that the proceeds of such claim has been received and that the Federal income tax due as a result thereof exceeds $50,000 and we therefore request that the tax

liability of $50,000 stipulated in paragraph 5.4 of the Purchase Agreement be paid to Insilco Corporation.

Very truly yours,

/s/ Anthony J. Mainella
ANTHONY J. MAINELLA
Assistant Treasurer

AJM/dbf

CC: 28 The Fairway
Upper Montclair, New Jersey 07043

Peter Vandervoort, Esquire
Evans, Hand, Allabough & Amoresano
One Garret Mountain Plaza
West Paterson, New Jersey 07505

APPENDIX H

LETTER DATED DECEMBER 28, 1976 FROM ANTHONY J. MAINELLA TO WILLIAM WALLIS

12/28/76

Mr. William Wallis
PO Box 733
Montclair, N.J. 07042

Dear Bill,

Because of the snow, we closed the office early and my secretary has left for the day. Perhaps by putting this in the mail tonight you will receive it in time for your meeting Sunday.

As you know, Insilco files the federal income tax return on a consolidated basis. Although Insilco had book income, it incurred a tax loss on a consolidated basis for the year 1975. Also as I mentioned over the phone, on a separate return basis as part of the Insilco consolidated return, Interlox incurred tax losses as follows:

Year	Amt. of (loss)
1972	(76,962)
1973	(106,908)
1974	(176,977)

Yours very truly

/s/ A. J. Mainella
A. J. MAINELLA

APPENDIX I

LETTER DATED JANUARY 24, 1977 FROM PETER VANDERVOORT TO JAMES M. COTTER

January 24, 1977

James M. Cotter, Esq.
Simpson, Thacher & Bartlett
One Battery Park Plaza
New York, N.Y. 10004

Re: *Interlox Punch and Die Corporation*

Dear Jim:

I have again been consulted by Mr. William C. Wallis of Interlox Punch and Die Corporation concerning his efforts to file a Federal Income Tax Refund Claim arising out of the significant tax loss incurred by Interlox Punch and Die for the fiscal year ended February 29, 1976. Mr. Wallis has consulted with Mr. Robert J. Heyliger, a qualified certified public accountant licensed in New Jersey and specializing in tax work, to prepare such refund claim arising out of the transactions between Interlox Punch and Die and Insilco Corporation as follows:

1. The payment by Interlox Punch and Die specifically for its tax liability on the consolidated return of Insilco in March 1975 of $5,300 as set forth in the agreement between the parties which closed on March 27, 1975.

2. The payment of Interlox Punch and Die of the sum of $50,000 as the tax liability with respect to the receipt by Insilco as assignee of Interlox Punch and Die of the insurance claim arising out of the defalcations of former members of Interlox Punch and Die.

3. $87,640.00 of deferred tax liability of Interlox Punch and Die as shown on the pro forma balance sheet dated December 31, 1974 attached as exhibit "A" to the agreement of March 27, 1975.

Prior to the agreement of July 30, 1976 we received written demand from Insilco Corporation for the latter two amounts as being the tax liability of Interlox Punch and Die Corporation as a wholly-owned subsidiary of Insilco Corporation, and the same was recognized as a liability in connection with the closing under the agreement of July 30, 1976.

The Federal Corporate Income Tax Return of Insilco Punch and Die for the fiscal year ended February 29, 1976 was due November 15, 1976, pursuant to applications for postponement of the filing date for such return and shortly thereafter Mr. Wallis got in touch with Mr. Anthony Mainella of the tax department of Insilco to obtain the necessary information to file a claim for income tax refund represented by the amounts paid to Insilco in the form of cash or machinery and equipment to the extent of the losses incurred by Interlox Punch and Die as shown on said return.

Finally, just before the end of 1976 Mr. Wallis received a handwritten note from Mr. Mainella indicating that in fact Insilco Corporation and its consolidated subsidiaries had paid no federal Income Tax for the years 1973, 1974 and 1975 on behalf of Interlox Punch and Die.

Such a simplistic approach would hardly satisfy the Internal Revenue Service in filing a claim for refund as contemplated by Interlox Punch and Die inasmuch as it has in fact paid to Insilco Corporation $142,940.00 in cash or machinery and equipment on account of Corporate Federal Income Taxes. It would seem only appropriate that Interlox Punch and Die Corporation or its representative, Mr. Robert J. Heyliger, be furnished copies of the Consolidated Federal Income Tax Return filed on behalf of Insilco Corporation for the tax years 1972 through 1975, together with the appropriate work papers backing up said return, so that Mr. Heyliger can make an analysis thereof and Interlox Punch and Die can receive its proper tax refund.

If, after such analysis, Mr. Heyliger determines that no claim for refund can be properly filed, we have a serious question concerning the efficacy of the payment of $142,940.00 by In-

terlox Punch and Die to Insilco, and this despite the fact of general releases delivered to Insilco by Interlox Punch and Die Corporation, Davea, Inc. and William C. Wallis.

Very truly yours,

/s/ Peter Vandervoort
PETER VANDERVOORT

PV:o

CC: Mr. Durand Blatz
Mr. Lawrence DeGeorge
Herbert W. Bertine, Esq.
Mr. Anthony J. Mainella
Mr. Robert J. Heyliger
Mr. William C. Wallis

APPENDIX J

§ 6211. Definition of a deficiency.

(a) *In general.* For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 42 and 43, the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 42 or 43, exceeds the excess of—

(1) The sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) The amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) The amount of rebates, as defined in subsection (b)(2), made.

§ 6151.

(a) *General rule.* Except as otherwise provided in this subchapter, when a return of taxes is required under this title or regulations, the person required to make such returns shall, without assessment or notice and demand from the Secretary, pay such tax to the Internal Revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).